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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of XIN WANG and
WEIHUA FENG.

XIN WANG,

Appellant,

v.

WEIHUA FENG,

Respondent.

D066772

(Super. Ct. No. D540541)

APPEAL from a judgment and order of the Superior Court of San Diego County,
Pamela M. Parker, Judge. Affirmed.

Buchalter Nemer and Robert M. Dato, for Appellant.

Weihua Feng, in pro. per., for Respondent.

This is a divorce case involving Chinese parents and physical custody over their American child, when only the father is legally entitled to reside in the United States. Xin Wang (Father) appeals a family court's judgment finding that his son (Child) should

primarily reside with Child's mother, Weihua Feng (Mother), in China. Father contends that the court erred because there was an existing "final" custody order and any modification of that order required changed circumstances, which he argues were not shown to exist at time of trial. He further contends that the court's consideration of the custody issue at trial constituted a denial of his due process rights. Finally, Father appeals the court's postjudgment order that denied his motion to include a "50/50" physical custody provision over Child and permitted Mother to obtain legal and/or travel documents for Child in China. Mother has filed a motion to dismiss Father's appeal based on postjudgment orders that she claims have rendered the appeal moot. We deny Mother's motion to dismiss and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Pre-Divorce Filing

Father and Mother, who are both Chinese citizens, were married in April 2010. Prior to Child's birth, they were legally residing in the United States based upon their respective employer-sponsored visas. In May 2012, Mother gave birth to Child in San Diego where Father's job was located, and she went on maternity leave. By September 2012, according to Mother, the couple's plan was for her to resign her Los Angeles-based job and become a stay-at-home mom. In order to legally remain in the United States on a permanent basis, Mother would need to be a dependent/spouse on Father's visa.

After resigning her job, Mother traveled to China without Child to visit her dying grandmother. After her grandmother died, Mother remained in China for several more months to care for her mother, who had become ill. While Mother was overseas, the

couple had several arguments and their relationship deteriorated. By December 2012, Mother was ready to return to the United States, but Father would not facilitate her return (i.e., by providing documents for her to be a dependent on his work visa).

B. Father Files for Divorce While Mother is in China

In January 2013, while Mother was in China, Father filed a petition to dissolve their marriage. In his petition and her response, Father and Mother each respectively requested sole legal and physical custody of Child. Mother explicitly requested the court to "grant me . . . custody and let me take the baby to China," stating that she did not have a valid visa to enter the United States while Father had a Chinese passport and could freely travel to China. In July 2013, the court adopted a Family Court Services (FCS) report as its "interim" order. The FCS report recommended that the parents have joint legal custody, shared physical custody when Mother could visit the United States, and otherwise, Child would primarily reside with Father. FCS reached its conclusion based on the fact that Child had been in Father's care for the last nine months.

C. Mother Arrives in the United States and the Parties Litigate Child Custody Issues

In early September 2013, Mother arrived in San Diego from China, having obtained a one-year tourist visa that allowed her to legally enter and remain in the United States for six months at a time. After the parties engaged in settlement discussions, the court was on the brink of entering a stipulated temporary order on child custody while continuing settlement conferences for several months on other disputed marital issues. However, because Mother had limited time in the United States, she wished to immediately proceed to hearings on the parties' requests for orders (RFOs), since those

hearings could begin the very next week. The court informed the parties that a long RFO was an evidentiary hearing, where they would get an "order with respect to child custody and visitation," but it was "not a trial on everything."

The hearings on RFOs proceeded over several days in September and October 2013. There was no court reporter present. The court minutes contained in the clerk's transcript reflect the kinds of documentary and testimonial evidence received by the court on the issues of custody, visitation, child support, spousal support, and community property. Within these minutes, the court (Judge Huguenor) indicated its "findings and orders as to custody and visitation," which confirmed in large part its July 2013 order. The court ordered joint legal custody, joint physical custody when Mother was living in the United States, and the child's primary residence with Father when Mother was not living in the United States (October 2013 Order). The court noted that its decision was based on the fact that Child had been "living with the father for a year while the mother was gone." The October 2013 Order set "time share at 50/50 since mother shall still be in San Diego at least 2 more months," and it was Judge Huguenor's hope that "the parents can live in the same community and raise the child together."

The minutes of a December 2013 family resolution conference (FRC) indicate that "[Father] wants a [mandatory settlement conference], [Mother] requests a trial. The remaining issues are custody/visitation and property division." The parties were notified that trial was set for February 2014. Several days later, the court granted Father a judgment of marriage dissolution (as to status only) per his request. At a January 2014

settlement conference, the court's and parties' comments on the record reflect that Mother's "move-away" request was unresolved and an issue "confirmed" for trial.

The trial occurred on two days in 2014, February 14 and February 25. There was no court reporter present. Both parties filed trial briefs in advance, with Mother's trial brief indicating that child custody and visitation were issues for trial. Father's trial exhibits incorporated all evidence from the hearings on RFOs and included supplemental evidence pertaining to child custody and visitation. At the start of trial on day one, the parties wished to clarify the issues to be tried. Specifically, Mother wanted the custody issue to be considered (or *reconsidered*) while Father contended the issue had already been resolved. Mother asserted that circumstances had changed since the time of the October 2013 Order. In the afternoon on the first day of trial, the minutes state that the court would "reconsider the previous temporary order made for child custody and visitation . . . since circumstances have changed regarding [Mother's] place of residency."

In April 2014, the court (Judge Parker) filed its 24-page proposed statement of decision, finding in relevant part that Child should primarily reside with Mother in China and could move away with her. Father filed objections, arguing that Judge Huguenor had already made orders on child custody and that Father did not have adequate notice of Mother's intention to seek a move-away order. Mother responded to Father's objections. After considering the parties' papers and arguments, the court found that Father's objections based on lack of notice were "disingenuous," noting that "[a]t no time during trial" did he or his counsel state that they had insufficient preparation time and required a

continuance. Furthermore, the court reaffirmed its belief and interpretation of the court's October 2013 Order as interim and not final.

Likewise, in its final statement of decision (FSOD), the court reiterated that it had reviewed the October 2013 Order and determined that it was a temporary order only. The court also discussed that circumstances had considerably changed by trial in that Mother had then spent months in the United States (on a tourist visa) caring for Child, forming a possible bond, and it appeared certain that the parties would not both be living in the same country. The court ordered Child to reside primarily with Mother in Shanghai, China. The FSOD, which is incorporated into the court's judgment, sets forth the court's considerations and rationale concerning why it was in Child's best interests to principally reside with Mother, including Child's young age, Mother's inability to be in the United States for an extended period, and Mother's more credible commitment to coparenting. The court's FSOD and judgment both state: "The Court intends this to be a final and permanent custody order within the meaning of *Montenegro v. Diaz* (2001) 26 Cal.4th 249 [(*Montenegro*)]."

D. Postjudgment

About one week after the judgment was signed, Father filed an ex parte request to, inter alia, take possession of Child's passport and modify the child custody/sharing arrangement if both parties were to reside in the same city. Within Father's supporting declaration, he states, "I have made plans to move with [Child] to Shanghai" and he was accordingly requesting a 50/50 physical custody arrangement if both parents were to reside in Shanghai. In support of changed circumstances, Father asserted: "the fact that I

am moving to China." He also claimed he needed Child's passport to protect Child's American citizenship and to prevent Mother from changing Child's nationality. Mother opposed his ex parte request.

The court held a hearing, considered the parties' arguments, and denied Father's request. The court stated that a 50/50 physical custody arrangement was preferable if both parents were permanently residing in the same city, but Father had not yet relocated to China, he had no anticipated move date, and no employment there. For the same reasons, the court found Father had not demonstrated changed circumstances to justify a modification of the court's final *Montenegro* order on child custody. As to Child's passport, the court discussed that Mother needed it for legitimate reasons such as identity purposes, ordered the passport to remain with her, and permitted either parent to obtain necessary travel and legal documents for Child in China. To assuage Father's concerns, the court ordered that "neither parent shall take any steps to compromise [Child's] U.S. citizenship."

E. Appellate Motions

Subsequent to the close of briefing on appeal, Father filed a request for judicial notice of trial court orders dated July 2015, which Mother opposed. Mother then submitted her own opposed request for judicial notice and motion to augment regarding documents appearing to relate to the July 2015 trial court proceedings. Mother also filed a motion to dismiss this appeal as moot, which Father opposes.

DISCUSSION

I. *Requests for Judicial Notice and Motion to Dismiss*

Although Mother opposes Father's request for judicial notice of the trial court's July 2015 order, she relies on the order to argue that Father's appeal has been rendered moot. The parties submit that the July 2015 order granted sole legal and physical custody of Child to Father, and the order is being separately appealed by Mother. Father contends that his appeal is not moot because the July 2015 order is being appealed and subject to reversal.

The parties' requests for judicial notice of orders, documents, and/or events occurring subsequent to the appealed judgment and order are denied and will not be considered as part of this appeal. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405 ["It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration' "]; see *In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1422 [augmentation of record permitted to confirm that issue on appeal had become moot].) Here, it is undisputed that the subsequent orders are the subject of a separately pending appeal and may be reversed; thus, the issues in this appeal are not moot. Mother's motion to dismiss is denied.

II. *The Court's Custody Orders*

A. Guiding Principles

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32

(*Burgess*).) Under this test, we uphold the trial court's ruling if it is correct on any basis, regardless of whether such basis was actually invoked. (*Ibid.*)

Depending upon the posture of the case, a trial court will use either the "best interest[s]" analysis or the "changed circumstance[s]" analysis. (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 955-956 (*Brown*).) The best interests analysis is used when making a permanent custody determination initially. "In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan that is in the best interest[s] of the child.' (Fam. Code, § 3040, subd. (b).) It must look to *all the circumstances* bearing on the best interest[s] of the minor child." (*Burgess, supra*, 13 Cal.4th at pp. 31-32.)¹ Relevant factors to be considered may include the child's health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child's contact with the parents. (§ 3011.)

Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interests of the child, the trial court must apply the changed circumstance rule when a parent seeks modification of the final judicial custody determination. (*Brown, supra*, 37 Cal.4th at p. 956.) Under the changed circumstance rule, custody modification is appropriate only if the parent seeking modification demonstrates "a significant change of circumstances" indicating that a different custody arrangement would be in the child's best interests. (*Montenegro, supra*,

¹ All further statutory references are to the Family Code unless otherwise stated.

26 Cal.4th at p. 256, relying on *Burchard v. Garay* (1986) 42 Cal.3d 531, 535.) In these cases, "a child should not be removed from prior custody of one parent and given to the other ' "unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change." ' " (*Burgess, supra*, 13 Cal.4th at p. 38, quoting *In re Marriage of Carney* (1979) 24 Cal.3d 725, 730.)

B. Analysis

Father challenges the court's judgment granting primary physical custody of Child to Mother, on the grounds that the court's October 2013 Order was a final custody order that could not be modified absent a showing of changed circumstances, which Father contends was not made. Father argues that the October 2013 hearings on RFOs were the functional equivalent of a separate trial under section 3023 and relies upon *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088, footnote 2, in which an appeal was taken from an " 'Order After Hearing.' "

We conclude that Father has not met his burden to demonstrate reversible error or the trial court's abuse of discretion. First, our review of the trial court proceedings has been severely limited by the lack of a reporter's transcript of either the hearings on RFOs or trial. California Rules of Court, rule 8.120(b) states: "If an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court, the record on appeal must include a record of these oral proceedings." The appellant has the burden to provide an adequate record on appeal to allow the reviewing court to assess the purported error. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181,

186-187 ["In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided"].) Without knowing what was said at the hearings on RFOs or at trial, we have been heavily constrained in our ability to assess whether the October 2013 Order was final.

Moreover, we observe that the Family Code gives the trial court wide latitude to make interim and temporary orders regarding child custody. (§ 3022 ["The court may, during the pendency of a proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper."]; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 559 ["A temporary custody order is interlocutory by definition, since it is made pendente lite with the intent that it will be superseded by an award of custody after trial"].) Here, the trial court interpreted its October 2013 Order as a temporary order. As a general rule, a trial court has the authority to construe and clarify its own order. (*Ballas v. Ballas* (1963) 217 Cal.App.2d 129, 132.) We have no transcript of the key proceedings, which may have shed light on the temporary or final nature of the hearings on RFOs and whether they constituted a separate trial.

Importantly, the trial court's interpretation of its own proceedings and order is sufficiently supported by the designated record. Nothing in the October 2013 Order denotes itself to be a final or permanent custody order or even that it was based on a consideration of "best interest[s]." In September 2013, Mother's situation was highly fluid due to the fact that she was in the United States on a temporary tourist visa, and the parties' settlement discussions on the RFOs were geared toward achieving a temporary

custody and visitation arrangement. Several months after the October 2013 Order was made, the court stated on the record that a large unresolved issue was Mother's move-away request, and Father's counsel commented that the parties had already gone to mediation on the move-away and acknowledged the issue to be unsettled. Counsel's actions appear inconsistent with a belief that there had been a permanent adjudication over the physical custody of Child. The court confirmed trial based upon its understanding that the issue was unresolved.

Even assuming that the October 2013 Order was a final child custody order, Mother had demonstrated significantly changed circumstances by the time of trial. The October 2013 Order for Child to primarily reside in the United States with Father was based on Mother's extended separation from Child. In addition, the court harbored hope that Mother and Father could reside in the same city. However, by the time of trial, the record supports that Mother and Child had been reunified for months and had spent considerable time together. The court found that Mother's previous extended separation from Child was due to her legal immigration challenges, which had been caused by Father. Also by the time of trial, it had become clear that Mother had no ability to permanently reside in the United States. Accordingly, the circumstances giving rise to the court's October 2013 Order had significantly changed, and it was appropriate for the court to reconsider Child's best interests on the issue of primary physical custody.

Father has not established that the court abused its discretion under either the best interests or changed circumstance test.

III. *Due Process at Trial*

Father next contends that the court's consideration of child custody as an issue at trial deprived him of due process because he was not notified that the issue would be litigated at trial and he was not prepared to litigate it. We disagree.

Based on our review of the entire record, Father had sufficient notice of the trial issues and adequate time to prepare. After the October 2013 Order was issued, various documents in the record put Father on notice that child custody was an issue contemplated for trial, including Mother's trial brief. Father's trial exhibits included evidence on child custody and visitation. One month before trial (and after the October 2013 Order had been issued), Father's counsel acknowledged that Mother's move-away request had been mediated and was ripe for trial, which cannot be reconciled with Father's contention that he was ambushed at trial by Mother's wish to move Child to China. Indeed, Mother's request for an international move away was apparent from her response to his divorce petition (let me take the baby to China), discussed in the FCS report, and repeated throughout proceedings.

Father asserts that Mother made an oral motion to modify child custody at trial, but as we discussed above, he did not provide us with a reporter's transcript of the trial. According to the judge presiding, the court typically asks the parties for a recitation of issues at the beginning of trial, the court was aware in advance that child custody was a trial issue because it had been included in Mother's trial brief, Mother did not make a motion but merely stated that custody was a trial issue, and the minutes may have been incorrectly notated by the clerk, who was not the court's regular clerk. We agree that the

issue is discussed at length in Mother's trial brief, and based on our review of the submitted record, conclude that Father had notice and time to prepare for trial.

Father was represented by counsel throughout his case. He made calculated decisions. If Father had been truly surprised or unprepared for trial, he could have asked for a continuance to collect additional evidence, but he did not. He could have introduced additional evidence on the second day of trial, but he did not. Father has not established that his due process rights were violated.

IV. *50/50 Physical Custody and Child's Legal Documents*

Father contends that the trial court erred by not making a shared physical custody order *if* he and Mother were to live in the same location. Furthermore, Father argues that permitting Mother to unilaterally obtain legal and/or travel documents for Child in China will jeopardize child's American citizenship.

During pretrial proceedings, the court stated that its sincere hope was for Mother and Father to be able to raise Child together in the same city, and the court ordered shared physical custody over Child while the parents were both living in the United States. By the time of trial, when the court was called upon to make a final custody determination, the evidence before the court was that Father resided in the United States while Mother resided in Shanghai, China. At trial, the court considered all the circumstances based on evidence presented, including Child's young age, need for stability, and each parent's historical commitment (or lack thereof) to coparenting. The court found that Child should primarily reside with Mother because, *inter alia*, she had demonstrated a greater commitment to coparenting. The court was not required to include in its final judgment a

provision about physical custody based upon a hypothetical circumstance of Father permanently moving to China. It was not inconsistent for the court to wish the parties to reside in the same city to raise their child together, yet make orders based upon the reality that they do not live in the same city.

Similarly, the court did not abuse its discretion in denying Father's ex parte motion to modify the final custody order. Father had not demonstrated changed circumstances to justify a modified custody order because he had not actually moved to China nor did he have concrete plans to move there permanently.

Finally, Father argues it was error for the court to permit either parent to obtain necessary documents for Child's life in China and allow Mother to possess Child's passport. We disagree. The court's orders were expressly conditioned on the overriding directive that neither parent could take any actions to compromise Child's American citizenship, which addressed Father's stated concern. At the time of the hearing on Father's ex parte request, Child was indisputably still in the United States, an American citizen, and not shown to be otherwise. The court did not abuse its discretion.²

² In his opening and reply briefs, Father makes a number of improper references to alleged events occurring subsequent to the appealed judgment and order. For example, he discusses subsequent court proceedings, the fact that he moved to China, and other events relating to Child's legal documents and/or identity. We do not consider or address those arguments.

DISPOSITION

Mother's motion to dismiss the appeal is denied. The judgment and order are affirmed. Mother is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.